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Why Lawrence v. Texas Has No Bearing on the Military

As America's new "spiritual overseers," the supreme Court decreed from on high regarding the mysteries of life by reworking the laws governing marriage and family, and as Justice Scalia propounded, even the sanctity of human life. *We the People*, were outraged as Justice Kennedy pontificated on the basis of the evolutionary nature of the Constitution, that is, it means what he says it means.

A few pundits have already suggested the Lawrence v. Texas decision will reach the military's ban on homosexual conduct. But let those outraged by the Court's decision know and understand the hands-off deference the courts have historically given to military-related judgments by Congress and the President. This should be especially so on the issue of sodomy.

The Constitution gives no authority to the Courts over the Military, because the framers recognized an unelected appointed body, with lifetime tenure, was an imbalance of power in an area foreign to the civilian courts. Therefore, the Judiciary in America "no influence over either the sword or the purse." (Alexander Hamilton, The Federalist No. 78, at 520). The Courts' hands-off position regarding the military is expansive—

- The death penalty in military capital cases (*Loving v. U.S.*, 517 U.S. 748, 768 (1996)
- Congress may order members of the National Guard into active duty (*Perpich v. Dept. of Defense*, 496 U.S. 334, 353-54 (1990)
- The President controls access to national security information (*Dept. of Navy v. Egan* 484 U.S. 518, 527 (1988)
- Registration of Males only for the draft (*Rostker* 453 U.S. at 83
- Regulation of military conduct under the Uniform Code of Military Justice, *Parker v. Levy*, 417 U.S. 733, 749-52 (1974)
- The Commander in Chief may commission all Army officers, *Orloff*, 345 U.S. at 90.
- No right of military trial by jury, *Kahn v. Anderson* 255 U.S. 1, 8-9 (1921).

The supreme Court has stated emphatically, "judicial deference...is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." (*Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). Clearly the findings of Congress in their extensive capacity for policy review are the sole basis for military regulation. Fifteen separate findings support the ban on homosexual conduct in the military because military life is fundamentally different from civilian life, and that "prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service." As the U.S. Court of Appeals for the Second Circuit declared, "Given the...special respect accorded to Congress's decisions regarding military matters, we will not substitute our

judgment for that of Congress." (*Able v. U.S.* 97-6205). It is well established: Courts are ill-suited to second-guess military judgments that bear upon military capability or readiness.

The testimony of military leaders before Congress established that the prohibition of homosexual conduct is necessary for unit cohesion and the military mission. General Schwarzkopf testified;

> [I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war" (Senate Report No. 103-112, at 281, 1994).

General Colin Powell testified that open homosexuality in units "involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force."

The courts have ruled that those who claim a "homosexual orientation" are likely to engage in homosexual conduct, and the military has a rational basis for their dismissal.

> The military is entitled to deference with respect to its estimation of the effect of homosexual conduct on military discipline and therefore to the degree of correlation that is tolerable. Particularly in light of this deference, we think the class of self described homosexuals is sufficiently close to the class of those who engage or intend to engage in homosexual conduct for the military policy to survive rational basis review. (*Steffan v. Perry*, 41 F.3d 677, 309 U.S.App.D.C. 281, 1994).

The considered professional judgment of military leaders reported to Congress and the President has been and constitutionally, will continue to be, the standard for military conduct (*Goldman v. Weinberger,* 475 U.S. 503, 509 (1986). The *Lawrence v. Texas* case is an inapplicable context. "[R]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities." *Beller*, 632 F.2d at 811.

Ultimately, the first military principles of "exemplary conduct" hold service members to a "sacred oath," a higher standard than for civilian citizenship. As late as 1997, Congress affirmed these first military principles for the Army and Air Force (10 U.S.C. §§ 3583 & 8583), noting these standards of "virtue, honor and patriotism" have applied to Naval and Marine Corps officers since they were first drafted by John Adams and approved by the Continental Congress in 1775.

Military principles have established a very clear standard by which Congress and the nation can measure officers of our military services. The committee holds military officers to a higher standard than other members of society. The nation entrusts its greatest resource, the flower of the next generation, to our military officers. In return the nation deserves complete integrity, moral courage, and the highest moral and ethical conduct in military leadership. Unlike military leadership, the Supreme Court Justices today do not consider social virtue requisite, as did America's founders, to the nation's security. Therefore, it's good they have no say in this military matter.